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[Timmons v. Mattingly Testing Services, Inc.](#), 95-ERA-40 (ALJ Oct. 20, 1995)

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Date: October 20, 1995
Case No.: 95-ERA-40

In the Matter of:

MICHAEL E. TIMMONS,
Complainant

vs.

MATTINGLY TESTING SERVICES, INC.,
Respondent

Appearances:

Stephen C. Mackey, Esq.
For Complainant

Mark Mattingly
For Respondent

Before: Thomas Schneider, Administrative Law Judge,

RECOMMENDED DECISION - DENYING COMPLAINT

Procedural history and issues

This case arises under the "whistleblower" protection of §211 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1995) (ERA), and the regulations at 29 C.F.R. Part 24. A hearing was held in Billings, Montana on August 9, 1995. Complainant, Michael E. Timmons (Timmons), appeared with counsel and respondent, Mattingly Testing Services, Inc. (MTS) appeared by its President, Mark Mattingly, and its Secretary Treasurer, Suzanne D. Mattingly. Evidence was received. The transcript of proceedings was received September 8, 1995.

In order to establish a prima facie case for relief under ERA an employee must show: (1) That the party charged with discrimination is an employer subject to ERA; (2) that he engaged in protected conduct; (3) that he was subject to adverse employment action; (4) that his employer was aware of the protected conduct when it took the adverse action; and (5) that sufficient evidence exists to raise the inference that the protected conduct was the likely reason for the adverse action. If the protected activity played at least some role in the firing, the respondent has the burden of showing that the adverse

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action would have been taken even in the absence of the protected activity. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y. Feb. 16, 1989) DOL Decs.[1] Vol. 3, No. 1, p. 162, 168; *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Respondent is an employer subject to ERA because some of the materials used in its inspections are radioactive. TR 9, 26.[2] This satisfies requirement (1) above. There is no question that Timmons was fired, which is an adverse action within the meaning of requirement (3) above. The questions to be resolved are thus whether Timmons engaged in protected activity, whether MTS was aware of that, whether the protected activity was a reason for the firing, and, if so, whether MTS would have fired Timmons had he not engaged in protected activity.

Facts

MTS is a firm that provides nondestructive testing and inspection services, including welding inspections, for a wide variety of industrial, maintenance and construction projects. TR 9. Mark and Suzanne D. Mattingly are husband and wife and president and secretary-treasurer, respectively, of MTS. Timmons was employed by MTS from March 1994 until he was fired on April 17, 1995. TR 9-10, 22. Timmons is a certified welding inspector, whose duties include conducting welding inspections. TR 10-11, 19. Bart Kutt is MTS's area manager in Billings, vice president of MTS, has worked for MTS since July 1990, and was Timmons's direct supervisor. TR 266.

Timmons had some safety concerns and felt that when he called them to the attention of Mark and Suzanne Mattingly they were ignored. TR 124-125. Timmons and a co-worker, Sam Bruno, contacted the Nuclear Regulatory Commission (NRC) on December 9 and December 14, 1994, complaining of unsafe radiography activities at MTS. PX 2; TR 81, 252. As a result an NRC investigator began an investigation of MTS on January 4, 1995. TR 33. Timmons and Bruno then met with the NRC for approximately three hours. TR 38. According to Timmons, Bart Kutt, complainant's supervisor, 'was really shook up' about the investigation. TR 39. An NRC investigation is a 'pretty serious matter.' TR 169.

Timmons had not been working in the field but in the office during December 1994, due to a work connected injury, a shattered heel. TR 52, 109. His pay was not reduced during the possibly 400 hours he worked in the office (TR 106), although this time was not chargeable to customers. TR 109, 132.

On January 5, 1995 the NRC investigators interviewed Bart Kutt for about forty-five minutes at the MTS office in Billings

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while Timmons was outside in his truck. TR 45. Timmons testified that when he came into the office at about 8:45 a.m., Kutt accused Timmons of turning MTS into the NRC. TR 44.

On January 7, at a meeting in the Billings office of MTS, Mark and Suzanne Mattingly told all the employees that "no one's job was at stake" and that it didn't matter who called the NRC,

that what mattered was to make certain corrections to MTS's radiation safety program. TR 68, 86-87.

In February or March Timmons was asked by Mark Mattingly if:

"I [Timmons] had talked to the NRC, and I said 'Yes, I did,' and if I knew who had called them...and I said, 'Yes, I do, but I'm not going to say who it is,' and he said, 'well, its awful funny that there was -- they have paperwork that could only come from this office [the Billings office], and you were in the office most of the time.'" TR 48, 87-88.

When Suzanne Mattingly asked Sam Bruno whether he had contacted the NRC, he said, "No." TR 259. Bart Kutt asked each of the employees whether they had called the NRC and each of them said no. TR 286.

On Friday, April 7, 1995, just before starting his vacation, Timmons was testing large I-beams, used in bridge construction, at Roscoe Steel. TR 52. He spent an hour-and-a-half testing five I-beams. TR 53. The inspection was a 'magnetic particle inspection' which includes a visual inspection. TR 70. Timmons made no 'findings,' i.e., he noted no items that needed repair. TR 72. He found no 'relevant indications,' i.e., defects. TR 55. He told Carl Solheim at Roscoe Steel that the items he inspected were okay. TR 199. His testing equipment was working sufficiently for the work although it was intermittently defective. TR 56, 112-113. He then worked at Scott Company for about one hour and then began his vacation. TR 57.

There were still five more I-beams to inspect at Roscoe Steel and Bart Kutt undertook the inspection of them on the following Monday. He found a significant number of "indications" on these, and was surprised that the first half of the same job had revealed none. He therefore re-inspected the five that Timmons had done and found 32 indications. TR 157-158, 160; ALJ 1. Carl Solheim, who is in charge of quality control at Roscoe Steel (TR 197) accompanied Kutt to look at the girders Timmons had inspected the previous Friday and Solheim visually saw some indications (TR 201) where mag particles had been applied. TR 203. All five of the girders inspected by Timmons had to come back into the shop for repairs. TR 202.

Suzanne Mattingly testified that they never had that

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dramatic a discrepancy between two inspections. "Zero to many is definitely an attention getter." TR 149-150. It appeared as if Timmons might not have done the inspection at all. TR 163, 164, 181-182.

When Timmons came back on Monday, April 17, he was told he was fired. TR 58-61.

Protected activity and employer knowledge

The foregoing facts clearly establish that Timmons's

contact with the NRC was protected activity.

Even though Mark Mattingly testified that he and the firm were not aware that Timmons was a whistleblower until the instant proceeding, Suzanne Mattingly stated that they knew Timmons had made a call requesting information. TR 12. I find that the Mattinglys had a very strong suspicion that Timmons was a whistleblower. And Kutt was convinced in his own mind that Timmons initially called the NRC. I therefore find that MTS had the knowledge which forms a part of the complainant's prima facie case.

The protected conduct as the likely reason for the firing

There are two ways here to raise the inference that the protected conduct was the likely reason for the firing. One is that Timmons justifiably felt nervous because he was being scrutinized for mistakes by Kutt, that Kutt did the scrutinizing because of the protected activity, and that the nervousness was the cause of doing the Roscoe Steel inspection badly. Although Timmons raised this scenario, he admitted, "I should have been able to concentrate more on the inspection at hand." TR 113. Further, it is hard to distinguish Kutt's feelings about Timmons because of the NRC investigation from his feelings arising out of Timmons's being at the office with a leg injury and not earning billable time for the company. Nevertheless, this scenario supports the finding that the protected activity played some role, if a minor one, in MTS's ultimate adverse action.

The second is that the Mattinglys and Kutt were angry with Timmons for his protected activity and wanted to retaliate against him for this reason. This seems more probable and more usual.

The cloud of whistleblowing hung over Timmons when MTS made the decision to fire him, although more than three months had passed since the investigators came. He testified that right after the investigation began he felt that Bart Kutt monitored his activity closely and Timmons felt "that I had one chance to make a mistake, and that it would be my last chance." TR 46. In February or March Sam Bruno told Timmons to 'watch his butt' because Bart Kutt was watching him. TR 135. The conversation with Mark Mattingly in February or March heightened his feelings of being watched and "scrutinized for any kind of mistake that I

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might make." TR 48. Even though Suzanne Mattingly implied that heightened scrutiny was required to get the radiation safety program on line (TR 83), I find that Timmons's contacts with the NRC were still enough on the minds of the Mattinglys and Kutt to color their perception of him.

Whether Timmons would have been fired regardless of his contacting NRC

Suzanne Mattingly stated that Timmons was fired because the inspection he conducted at Roscoe Steel was insufficient, his disregard for the importance of that inspection, and his lack of explanation for his insufficiency. TR 69.

I find that the Roscoe Steel inspection was such a serious error that Timmons would have been fired even if he had never contacted the NRC.

Carl E. Solheim, the quality control person at Roscoe Steel

was a very credible witness. The day after Timmons was fired he went to talk to Solheim. Solheim testified as follows about that conversation.

A. When Mike [Timmons] came out, what I got out of the conversation was he pretty much came out and apologized for what had happened, and that he was a better inspector than that, and it shouldn't have happened, and he'd been having some problems that had been weighing on his mind, if you will -- these aren't his exact words -- but he pretty much came out and apologized. And I don't know what else to say, but that's --

Q. Did you feel that -- Do you think the overlooking of indications on five bridge girders is no big deal?

A. No, it is a big deal. This is serious for Roscoe. We must know that our product is a quality product, and that it meets the job specification requirements, in this particular case for weld quality. This was a bridge for the State of Wyoming. You're talking public safety. TR 206.

...

Q. If I tell you that Mr. Kutt apparently found 32 indications on the five girders, and the Mr. Timmons found none, would you find that to be a rather substantial -- I mean in your opinion, is that a large number of differences to find on five girders?

A. Heavens to Betsy, yes. TR 207.

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Timmons asked Solheim whether Roscoe Steel would be willing to accept him as an inspector if he went into business for himself. Timmons was apparently pleased with the answer he got. But Solheim testified:

I have a different opinion now of what I told him. It's

easier to be a coward and not say exactly what you're thinking at the time when you're face to face with somebody, kind of like electricity and take the easy route. And I told him I would not be concerned, but the truth of the matter is I would be concerned. TR 215.

The inadequate inspection that Timmons performed at Roscoe Steel was obviously a major event. Carl Solheim was Roscoe Steel, an important customer, as far as the Mattinglys were concerned. He thought the discrepancies between Timmons's findings and the findings by Kutt were extremely important. He did not feel that he would use Timmons as an inspector if he were in business for himself. And Bart Kutt was the man most often requested by Roscoe Steel to do their inspections. TR 167, 204.

This error was clearly the overwhelming reason for the firing.

It is conceivable that, if Timmons had been an outstanding and valuable employee, he might not have been fired for the Roscoe Steel event. But Timmons was not. He had been accommodated beyond legal requirements for his workers' compensation injury, costing money without doing billable work, and did not get along well with Kutt, a long time and valuable employee and officer of the company.

Timmons felt that Bart Kutt was angry at him even before the NRC investigation because Timmons had light office duty instead of field work. TR 88, 138. Allegedly Kutt had told him, "Get off your butt in the office and go do the [Wyoming] job [in the field]." TR 130. Suzanne Mattingly testified as follows:

Q. [By the court] What was your understanding of the tension that you mentioned between Mr. Kutt and Mr. Timmons?

A. Well, we knew that when he had called in different times, as far as -- One phone call in particular, he [Kutt] said, 'Now I've got both of his [doctor's] releases, I sent him out to a job, you said go ahead and work him, and he called in, and he needed to go home. I let him go home. Do you want me to continue to let him go home?' And over the course of the releases and various things, we had continued to ask Bart [Kutt] to fit jobs to his abilities, and I just

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sensed that he just was getting kind of tired of doing that.

Q. And I gather from the tone of your voice you kind of agreed with him? TR 189-190.

She agreed that Timmons should be let go 'if he could not explain this because I didn't want to continue to fit stuff to the man's schedule, and I didn't want to -- if it meant dramatic inspection results would come back[.]' TR 147.

If there was tension between Timmons and Kutt the Mattinglys would clearly side with Kutt.

Although Timmons apologized to Solheim for his inadequate inspection, he did not apologize to the Mattinglys or have an explanation for them. When Suzanne Mattingly asked Timmons shortly after his termination what accounted for the dramatic difference between his inspection and Bart Kutt's, Timmons replied that she needed to be aware of what was going on in Billings and other people had done worse. TR 94.

I find that Timmons would have been fired for his inadequate inspection even if he had not engaged in protected activity.

I recommend that the Secretary enter the following

ORDER

The complaint of Michael E. Timmons is denied.

Thomas Schneider
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1] DOL Decs. refers to the publication of the United States Department of Labor entitled "Decisions of the Office of Administrative Law Judges and Office of Administrative Appeals." Secretary of Labor Decisions are also available on a CD ROM published by the Office of Administrative Law Judges, entitled "Whistleblower Library" for sale by the U.S. Government Printing Office, Superintendent of Documents.

[2] TR refers to transcript of hearing; PX refers to

Complainant's exhibits, which are labelled "Plaintiff's exhibits;" RX refers to Respondent's exhibits; ALJ refers to ALJ exhibits.